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ABSTRACT

To make democracy work, whatever relates to government or public business should be open to comprehensive scrutiny: conversely, whatever is related to individual citizens and their private lives should be protected from undesired exposure. This recognized need to balance privacy and the right to know reflects an inevitable conflict. Despite the elemental and ever-present nature of this conflict, the United States Constitution provides neither the right to privacy nor the right to know directly. The Ninth Amendment makes it obvious that none of the specific liberties cited in the Bill of Rights is absolute, and it provides the courts grounds for the judicial interpretation of other rights not mentioned specifically. To balance the often conflicting interests of the two rights, statutes, jury verdicts, and court decisions might follow this basic guideline: unless disclosure of the information is in the public interest--to satisfy government's need for information about the public it is striving to serve, or the people's need for information about newsworthy events or other public affairs--then the dissemination of information about private matters can be seen as an unjustified invasion of privacy. (HOB)

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Perpetual Conflict

THE PEOPLE'S RIGHT TO KNOW
VERSUS RIGHT OF PRIVACY

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Talk to Fineman Discussion Group
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Let's begin, as discussions like this so often do, productively, with an apocrophal story.

Looking for a bit of relief from the summer's heat, an inner city woman cautiously ventures from the interior of her home out to the old-fashioned front porch of the house. She sits down there, relaxing in the soft breeze that blows across the porch.

Given those circumstances, we can appreciate, easily, the woman's casual appearance. She is not decked out in her best dress, obviously, for a formal banquet at some place like Philadelphia's Union League. On the contrary, she has her hair in rollers, is barefoot, and attired in something akin to a nightgown. But...she isn't expecting to see anyone, in her state of comparative undress, except good old friends and neighbors.

Strolling through the neighborhood at that precise moment of golden reportorial opportunity, however, ^{is} a photojournalist for one of the city's newspapers. Using a telephoto lens, the photographer captures, for posterity, Ms. So-and-So's coveted moment of sartorial splendor.

She sues the newspaper for invasion of privacy.

Now, what is a news medium's standard defense in such a situation?

It goes like this:

Conceded that Ms. So-and-So didn't invite photographic recognition, in any way, the offending picture was taken from public property, where anyone had a right to be; and anyone standing on that sidewalk, from which the picture was taken, could have seen the same thing that was photographed.

Those points are conceded by Ms. So-and-So and her attorney. However, they argue, that isn't the critical issue. She had no way of knowing, when she walked out on her front porch, that she was being observed close^{up} through

the eyes of a photographer and his telephoto lens, by several hundred thousand readers of one of the country's largest newspapers. Had she realized that, of course, she obviously would have remained inside her home.

If anyone is that sensitive, some callous persons might say, she or he should do just that.

Perhaps so. Perhaps not.

Whichever the case, let's project ourselves, now, into 1984.

Cosmos News Service announces that one of its technicians has invented a camera--"Penetron Penultimate Peep"--that observes and takes pictures through foliage, cloth, wood, plaster, etc. Using such a camera, which is expected to be available for mass super market sale soon, a CNS photographer takes a picture of a man and woman in bed affectionately involved in reading Pilgrim's Progress. The couple sue, asking damages for invasion of privacy. Since the picture was taken from a public sidewalk, the news service responds, anyone standing at that spot could have seen the same thing as the photographer recorded--if he or she, like the CNS staffer, had a PPP.

Does the preceding situation illustrate a logical progression of the people's right to know what's going on anywhere, at any time, with anyone?

No, you say. We have, in any civilized society, an inherent and inalienable right of privacy.

Once you accept the premise that human beings have a "right" to privacy, however, you have to build into the social structure--somehow, in a practical manner--the means of protecting that right.

In our society, we've gone about doing that in the most off-hand manner imaginable. There is no mention of the right of privacy, or the people's right to know, either, in our federal constitution's cherished Bill of Rights.

Except for a provision that people's homes must remain free from "unreasonable search," the constitution is silent concerning mankind's ancient and perpetual attempt to balance, somehow, the conflicting interests between elemental animal curiosity and the desire to know all kinds of things about other

people, on the one hand, and the equally viable desire to keep secret certain things about our private lives and affairs.

The concept of privacy as a human right--Justice Brandeis once called it the "right most valued by civilized man"--is an ancient principle, and has been found by anthropologists to exist in primitive society, even.

Of comparable antiquity, however, is the idea of a "people's right to know," especially about government and its activity.

With the development of democratic government, that aspect of "people's right to know" took on a special significance.

"Nothing could be more irrational," James Madison once observed, "than to give the people power, and to withhold from them information without which power is abused. A people who mean to be their own governors must arm themselves with power which knowledge gives. A popular government without popular information or the means of acquiring it is but a prologue to a farce or a tragedy, or, perhaps both."

In order to make democracy work, all of us, like Madison, believe deeply, what is government-public-business should be open to comprehensive scrutiny.

And, conversely, whatever relates to individual citizens and their private lives should be protected from undesired exposure.

It's that simple, really. So where's the theoretical conflict between "people's right to know" and "right" of privacy?

The conflict arises from this basic fact of political life: The function of government, by definition, more or less, is to govern individuals--to regulate the private lives of individual citizens, in the general interests of all.

In order to do its job properly, any government has to assemble tons of data on private affairs of individuals--their income and financial transactions; health, employment, opinions of associates, education, etc.

Therefore, the recognized need to balance privacy versus right to know reflects not so much an inevitable conflict as an acknowledgement that they are the competitors in a zero-sum game.

Whatever is added to the people's right to know, a justice of the Supreme Court once observed, has to be subtracted from the right of privacy. And vice versa, of course.

For many years, as journalists and assorted allies moved aggressively toward the needed expansion of public information law, the "people's right to know" was one of our society's most popular ideas--an actual shibboleth, at times.

With the trend toward computerized personal data banks, greater government regulation, the growth of police surveillance during the turbulent 1960s, continuation of the population explosion and its over-crowding of the environment, the continuing sophistication of technology and techniques for spying upon others, people began to assert, vigorously and vociferously, their right of privacy.

Perhaps, as one person has suggested, the reaction against today's drive for more intelligence about others--public officials, "public figures," our neighbors or business associates--is only a primitive backlash against civilization's march to utopia. Perhaps the tenet of privacy, in social ideology, is dysfunctional, as has been suggested by a social psychiatrist.

Perhaps, as one humorist put it, the agony over right of privacy are the screams of David Riesman's inner-directed man going down for the third time, in the flood-time of other-directed society, and "making a bad scene of it all."

Most of us still believe in the right of privacy, however--even if it's articulation is only a swan song of an out-of-it generation--^{and} believe it's a thing of beauty.

We're experiencing a revival of interest in privacy, it appears, partly as a reaction against some of today's most outrageous and offensive enterprises in "people" journalism--known also as "peephole" reporting.

Recently, we found ourselves treated to this kind of promotion ad in a newspaper like the Chicago Sun-Times:

Time magazine gives columnist Joyce Haber the ultimate accolade.

HOLLYWOOD'S NEW NO. 1 VOYEUR

'Follow her behind-the-scenes reporting of the glamorous movie world in the Sun-Times,' the ad advises, 'Learn why Time calls her "the woman who is responsible for reviving the Hollywood gossip column".'

British gossip columnist Nigel Dempster explains the phenomenon in this way:

We live in a banana-peel society, where people who are having a rotten, miserable life--as 99.9 per cent of the world is--can only gain enjoyment by seeing the decline and fall of others... They see that those who obtain riches and fame or high position are no happier than they are. It helps them get along.

However, David Shaw explains, "many see this invocation of the public's 'right' (and zeal) to know as an irresponsible journalistic rationalization," and quotes another journalist (William Safire) as pointing out that "the public interest is not the prurient interest. Just because some people enjoy the misfortunes of others--a perverse pleasure the Germans call 'schadenfreude'--is no reason for newspapers to satisfy that longing."

Such stuff is not new, by any means. For back in 1891, Oscar Wilde expressed his indignation in this manner:

In centuries before ours the public nailed the ears of journalists to the pump. That was quite hideous. In this century journalists have nailed their own ears to the key-hole.

Researching the news media's history, in this country, a social psychologist rediscovered one of our earliest and most interesting manifestations of the sometimes symbiotic but also antagonistic relationships between governmental services to individual citizens, the right of privacy, and the way in which news media play a fascinating role as middleman.

Because such a large number of our country's early newspaper editors served as postmasters, Carroll Clark observed, they were tempted, at times, to

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coopt information being communicated by private correspondence (see as privileged, generally, in our postal tradition) through the mails.

Our historic conflict between privacy and "people's right to know" was noted many years ago by Walter Lippmann, a journalist himself, in a most perceptive little book about the formation of public opinion. In the book, he observes:

At different times and for different subjects some men impose and other men accept a particular standard of secrecy. The frontier between what is concealed because publication is not, as we say, 'compatible with the public interest' fades gradually into what is concealed because it is believed to be none of the public's business. The notion of what constitutes a person's private affairs is elastic. Thus the amount of a man's fortune is considered a private affair, and careful provision is made in the income tax law to keep it as private as possible. The sale of a piece of land is not private, but the price may be. Salaries are generally treated as more private than wages, incomes as more private than inheritances. A person's credit rating is given only a limited circulation. The profits of big corporations are more public than those of small firms. Certain kinds of conversation between man and wife, lawyer and client, doctor and patient, priest and communicant are privileged. Directors' meetings are generally private. So are many political conferences. Most of what is said at a cabinet meeting, or by an ambassador to the Secretary of State, or at private interviews, or dinner tables, is private. Many people regard the contract between employer and employee as private. There was a time when the affairs of all corporations were held to be as private as a man's theology is today. There was a time before that when his theology was held to be as public a matter as the color of his eyes. But infectious diseases, on the other hand, were once as private as the processes of a man's digestion. The history of the notion of privacy would be an entertaining tale. Sometimes the notions violently conflict, as they did when the bolsheviks published the companies, or when somebody's scandal exudes from the pages of Town Topics to the front pages of Mr. Hearst's newspapers.

Whether the reasons for privacy are good or bad, the barriers exist. Privacy is insisted upon at all kinds of places in the area of what is called public affairs.

Despite the elemental, aged, and ever-present nature of our conflict between privacy and right to know, I have mentioned previously, our federal constitution provides neither of those rights directly.

There exists, nevertheless, a quite sound basis for both rights in the federal constitution. It's the ninth amendment, which makes it obvious that none of the specific liberties cited in the Bill of Rights is absolute and provides the courts grounds for the judicial interpretation of other rights not mentioned specifically. The ninth amendment reads:

"The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

Two other rights retained by Americans, in accepting the federal constitution and its provisions, we can argue, were the "people's right to know" and right of privacy.

Although it is not mentioned in the Bill of Rights, and therefore presumably will never be seen as having a "preferred" position like freedom of speech, religion, and press, the right of privacy is not required to defer, always, to freedom of speech or press. These rights shall not be construed, the ninth amendment states, to disparage rights like privacy.

Under the same rationals, it's being argued that the ninth amendment commands similar respect for our right to know, even though the United States Supreme Court has pointed out that the first amendment (freedom of the press) is not a freedom of information act.

So, we're left, as before, with the need to balance the often-conflicting interests of two rights seen as comparably viable and legitimate in constitutional law.

What should be the guidelines, and, crucially, who is to create them?

The latter question is easy, of course. Its obvious answer: the courts, following principles developed in common law, and through the enactment of statutes demanded by you, me, and our fellow Americans.

Statutes, jury verdicts, and court decisions hopefully will follow, always, this basic guideline:

Unless disclosure of the information is in the public interest--to satisfy government's need for information about the public it is striving to serve, or the people's need for information about newsworthy events or other public affairs--then the dissemination of information about private matters can be seen as an unjustified invasion of privacy.

Given general agreement concerning that premise, a lot of logistical problems remain.

Is privacy strictly an individual right, or can it be shared by a person and his or her spouse, a parent and child, brothers and sisters, cousins, a penitent and his priest, a doctor and patient, an accountant and client, journalist and source of news, executive and secretary, business partners, members of a private club, political associates.

What relationship to one another do those claiming privacy have to have, in other words?

How big can the group get before it loses its privacy? Is there such a thing as organizational privacy, and should it be protected legalistically?

Do people forfeit their privacy when they move their conversation from a private home or office into a public park, on to a sidewalk, or into^a secluded corner of the municipal building's lobby?

Should someone equipped with a high-fidelity and directional microphone be allowed to monitor and broadcast the conversations of two public employees enjoying apicnic beside the fountain in Central Square?

Should other people be able to monitor and publish the conversation between a mental patient and staff at a state tax-supported institution, even though such behavior would be off-limits at a private psychiatric clinic?

In addition to considerations of geography, status or relationship of persons involved, and size of group, we have the over-riding consideration of public interest and/or newsworthiness--and those qualities, naturally, will change almost daily. And even if a thing is newsworthy, does its dissemination remain in the public interest forever?

What is news, anyway?

Newspeople themselves don't agree, at times.

To appreciate the problem more deeply, let's look at some questions that have arisen.

Does privacy give a person the right to keep secret the fact that he has a gun in his home, or do others have a right to know?

Does the people's right to know give a Ku Klux Klan type newspaper the privilege of examining the federal government's list of names of confidential complaints from black citizens and others alleging that their civil rights have been abridged?

Do media of mass communication have an unqualified privilege to broadcast or publish, without restriction of any kind, any information to which access could be obtained by an interested person?

Do people have the right to know whether or not the man who may have saved a president's life is a homosexual?

Can the name of a person suffering from some rare disease be kept secret, even though the disease is a matter of strong public interest?

Is every fact in the possession of some public official or agency, therefore, a public record available for inspection by newsmen or others?

Should the records of disciplinary actions taken against students at state universities be open for public inspection?

How about the salaries of people employed by private organizations to conduct programs subsidized through public funds?

What kinds of information about themselves should private citizens be required to make matters of public record, under threat of coercion, if necessary, in order to obtain the desired disclosure?

In pressing its right-to-know, is the public justified in coercing disclosure of information by news media?

Questions like those can be answered by law, at times. Often, however, the dilemma is more ethical than legal.

Let's look, briefly, at a particularly sticky area of privacy. Sexual behavior. More specifically, today's controversy over "right to life" arguments against abortion.

Exploring one of the issue's ethical problems, for Journalists, Arthur Miller, a professor of law at Harvard University, created this hypothetical case:

Babette Banal, formerly a well-known newspaper columnist, is president, today, of Nirvana State University. One of the most prominent leaders of the "Right to Life Movement" she gives talks about it, frequently.

A news reporter learns, from an anonymous source, that 25 years ago, at age 17, Babette Banal had an abortion.

Should he publish that story?

Obviously, some of his associates say. "It goes to the heart of her credibility," they argue, "as a leader in 'right to life'."

The reporter agrees, generally, but decides to talk with Babette Banal, of course, before completing the story.

"Your facts are absolutely correct," Ms. Banal tells the reporter. "I did have an abortion at age 17. I had been raped. I became pregnant. I had the abortion. It was the most traumatic experience of my life. That is why I became a right-to-lifer, but I have lived with this quietly all these years and it would destroy me, psychologically, if you publish it now."

Should the news reporter go ahead? It's a tough decision. Miller made it even more difficult, however, by hypothesizing this as Babette's response to the original question:

"Yes, I had been raped. You have the facts a bit wrong, though. I had been raped and I went to have an abortion. But, how or why I don't know, in the middle of the abortion the police broke in. So the pregnancy was never terminated, so my 26-year-old daughter doesn't know this thing about herself."

Such tough decisions between right to know and privacy would be eliminated, of course, by voiding right of privacy as a quaint artifact of cultural lag--a neurotic hang-up that's going to be out-of-place in tomorrow's global village envisioned by Marshall McLuhan.

There, presumably, we'd be required to live in nudist camps, and life presumably would be uninterrupted session in sensitivity training.

Not only would the news reporter's claim to professional secrecy be forgotten, in such a society, but the Fifth amendment repealed.

I think we're better off, immeasurably, wrestling with the problems of reconciling privacy with right to know.

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